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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	

COMMENTS OF ICG COMMUNICATIONS, INC.

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SUMMARY

ICG questions the Commission's assumption that a negotiated rate for ISP compensation will be a "market-driven" rate. Market-driven negotiations between ILECs and CLECs are not possible at present given the overwhelming dominance of the ILECs. So far, the key rates established under Sections 251 and 252 have been based on regulated rates established in a state's TELRIC cost docket or arbitration proceeding. Subsequent rate negotiations have been driven, not by market forces, but by these regulated rates.

In light of this reality, there is little purpose to be served by returning the ratesetting process for ISP compensation back to the states for 50 new rounds of negotiations.

Now that the FCC has defined ISP compensation as an interstate rate, the FCC should act affirmatively to set the rules and rates for ISP compensation.

In exercising its interstate ratesetting authority, the Commission should not rely on further negotiations, but should prescribe a rate structure and rates for termination of ISP traffic. At best, negotiations would be an unnecessary and time-consuming prelude to the Commission itself arbitrating or prescribing a rate.

The Commission should take the existing reciprocal compensation rates as the starting point for prescribing an ISP compensation rate. The Commission has authority to prescribe inter-carrier compensation under Section 201(a) where necessary and desirable to

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prevent rate disparities. The Commission should prescribe "default" rates while allowing the parties to negotiate different rates if they wish.

In prescribing a rate, the Commission should require consistency with the rate structure used for similar services. ILECs initially presented cost studies that justified a high compensation rate, but now that they find they are net *payors* of compensation instead of *payees*, they are claiming that the rate is too high. To ensure that ILECs present accurate cost studies, the Commission must require consistency in the rate structure and cost studies used for ISP compensation and other call termination services.

First, rate symmetry should be maintained between the compensation rates assessed by ILECs and CLECs. Second, the rate structure for ISP termination should be the same rate structure that applies to terminating access – a per-minute rate. Third, the rates should be based on the same TELRIC cost studies used to set termination rates for voice traffic.

The initial ISP compensation rates should be set at the existing state-approved TELRIC rates, subject to a "floor" set by the FCC's proxy rate. Any future updated TELRIC cost studies should be submitted for FCC review. The Commission can presume that rates above the FCC proxy "floor" are accurate, but any cost studies that produce rates below the proxy floor should be independently investigated by the FCC before being approved.

The submission of TELRIC cost studies will also enable the Commission to use those studies as a fair measure of terminating access cost in the event that the Commission decides to move access charges closer to cost.

Finally, the Commission should recognize that ensuring fair compensation rates is only one aspect of the increasingly important task of ensuring fair competitive conditions for local data services, including equal access to new loop technology such as DSL.

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COMMENTS OF ICG COMMUNICATIONS, INC.

ICG Communications, Inc. submits the following comments in response to the Commission's Notice of Proposed Rulemaking in this proceeding, FCC 99-38, released February 26, 1999 ("Notice").

I. CARRIERS TERMINATING ISP TRAFFIC ARE ENTITLED TO COMPENSATION FROM THE ORIGINATING LEC

As stated in the Notice, local exchange carriers ("LECs") incur a cost in terminating traffic to ISPs. In addition, LECs terminating traffic to internet service providers ("ISPs") enable the originating LEC to avoid costs that the originating LEC would otherwise incur. LECs terminating ISP traffic are entitled to be compensated by the originating LEC for the costs that the terminating LEC incurs to terminate such traffic.

II. THE FCC SHOULD PRESCRIBE THE RATE STRUCTURE *AND* RATES FOR CARRIER-TO-CARRIER COMPENSATION FOR ISP TRAFFIC

The Commission tentatively concludes that "[f]or the traffic at issue here, . . . a negotiation process, driven by market forces, is more likely to lead to efficient outcomes than are rates set by regulation." Notice, ¶29. The Commission then invites comment on two alternative proposals to resolve disputes arising under such inter-carrier negotiations. Under the first alternative, which the Commission tentatively concludes should be adopted, the Commission would require negotiations over inter-carrier compensation for ISP traffic to be subject to the existing Section 251/252 process of state PUC-supervised negotiations and arbitrations. Notice, ¶30. Under the second alternative, the Commission would establish a federal arbitration process to resolve disputes over inter-carrier compensation for ISP traffic. Notice, ¶31.

ICG questions the Commission's assumption that, for ISP traffic, a negotiated rate will be a "market-driven" rate. Although the 1996 Act has provided a negotiation/arbitration paradigm for determining rates, terms and conditions governing interconnection with incumbent LECs ("ILECs"), the actual operation of that paradigm is a long way from being driven by market forces. None of the rates or rate structures in ICG's interconnection agreements with ILECs were driven by the forces of an effectively competitive market; an effectively competitive market does not yet exist. While an effectively competitive market may yet emerge, it is still a long way from the point where negotiations between ILECs and competitive LECs ("CLECs") come anywhere near approximating the "efficient" outcomes of an actually competitive market. This limitation on the ability of ILEC-CLEC negotiations to produce "market-driven" rates applies at least as much to compensation for ISP traffic as to any rate governed by Sections 251 and 252 of the Act.

So far, the key rates established pursuant to Section 251 and 252 *have been* effectively rates set by regulation, and *not* by market-driven negotiations. In the states where ICG does business, the rates for reciprocal compensation and other critical interconnection elements have been derived directly or indirectly from one of two places: (1) the state commission's findings in its TELRIC cost docket; or (2) the rates set in the state commission's arbitration of a "lead CLEC's" (or a mega-arbitration of several CLECs') interconnection disputes with the ILEC. That regulated rate then serves as a "default" rate that guides the negotiations of other CLECs with the ILEC. Thus, what drives the negotiations is not "market forces" – it is the regulated rates.

In light of this reality, the Commission must carefully reexamine its tentative conclusions regarding *both* (1) the appropriate jurisdictional forum for resolving the ISP compensation issue and (2) the appropriate procedure for setting ISP compensation rates.

A. The FCC Should Take Responsibility For Ensuring That Fair Compensation Rates Apply To Interstate ISP Traffic

The FCC should set *both* policy *and* rates for carrier-to-carrier compensation for terminating ISP traffic. While the Notice tentatively concludes that compensation levels should be determined through negotiations and arbitrations conducted at the state level under Sections 251 and 252 of the Act, in the same Notice the Commission has found that ISP traffic "appears to be largely interstate" (Notice, ¶ 1) and that the reciprocal compensation requirement of Section 251(b)(5) of the Act applies "only to the transport and termination of local telecommunications traffic" (Notice, ¶ 7, citing Local

Competition Order,[1] ¶¶1033-34). Given that the Commission has found that ISP traffic is not local and that termination of such traffic is *not* governed by Section 251(b)(5), it follows that the Commission should determine and implement the policies and requirements governing termination rates for this largely interstate traffic. Direct FCC oversight will ensure that federal safeguards at least equivalent to those of Sections 251 and 252 will govern the rate structures and rates applicable to inter-carrier compensation for interstate ISP traffic.

Now that the FCC has defined ISP compensation as an interstate rate, sending the ratesetting for ISP traffic back to the states would unnecessarily multiply and prolong the ratemaking process and its attendant litigation. There is no need for 50 separate rounds of additional negotiations and arbitrations for rates that have already been established. One round of 50 negotiations and arbitrations is enough. Further, sending the issue back to the states runs the risk that there will not be uniform effective implementation of federal policy for this traffic. With many different jurisdictions addressing the issue, there would be potential for widely varying and inconsistent interpretation of applicable guidelines.

Therefore, the Commission should affirmatively act to set the rules governing compensation for interstate ISP traffic. In addition, because the states have no statutorily

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[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 16013 (1996) (Local Competition Order), aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997), aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC, 120 F3d 753 (8th Cir. 1997), aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996); Second Order on Reconsideration, 11 FCC Rcd 19738 (1996); Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997); further recon. pending.

prescribed role in regulating interstate rates that fall outside Sections 251 and 252, the Commission should directly oversee interstate ISP compensation rates in order to conserve resources and ensure that federal policies are carried out.

B. The Compensation Rate For ISP Traffic Should Be Prescribed, Not Negotiated

The Commission should also reexamine its tentative conclusion that inter-carrier compensation rates should be established through commercial negotiations. As discussed above, the negotiations to implement Sections 251 and 252 have not been "market driven," and the key rates specified in those agreements have been established by regulatory arbitration and tariff proceedings. Where negotiations are not guided by the results of cost dockets and prior arbitrations, they tend to be one-sided and do not result in efficient rates. Therefore, the Commission cannot expect negotiations to produce "efficient" or fair rates for inter-carrier compensation for ISP traffic. At best, negotiations will be an unnecessary and time consuming prelude to the Commission itself arbitrating or prescribing a rate.

In the current context, moreover, putting the parties through another round of negotiations would be especially wasteful. The parties have already been through one round of difficult negotiations, In almost every case, the rate in effect is an arbitrated or regulated rate established after initial negotiations had broken down.

1. Further Negotiations Would Involve Unnecessary Delay And Are Unlikely To Produce More Efficient Rates

As discussed in Section III, below, the reciprocal compensation rates that currently apply have the virtue of being, for the most part, reasonable efforts by regulators to set a nondiscriminatory, cost-based rates using the FCC's Telecommunications Act rules as a guide. The Commission should build on these existing rates. Because reasonable rates have already been established by state authorities, there is no valid reason to force LECs through another tortuous round of negotiations prior to setting "interstate" rates for essentially the same service.

When long distance competition was initially mandated some twenty years ago, the Commission brought the parties together for a "negotiated" settlement of rates for "exchange network facilities for interstate access" ("ENFIA"). After a long process and a lot of "headknocking" by the Commission, a settlement was reached, but it was only a temporary solution. To the extent that it worked at all, it was only because the Commission actively oversaw and intervened in the process to move it toward a reasonable result. Further, the ENFIA negotiations did not eliminate the need for a ratesetting proceeding. On the contrary, even with heavy FCC involvement, the Commission concluded that the result was unsatisfactory as more than an interim rate. To arrive at permanent rates, it was necessary for the Commission to prescribe a rate structure and in some instances actual rates in CC Docket No. 78-72. Following the prescription of a rate structure, the Commission established actual rates in its access tariff review proceedings.

Further, the ENFIA process was a relatively simple negotiation involving primarily two incumbent carriers – the Bell System and GTE[2] – and two competitors.[3] A federal

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[2] The non-Bell/GTE telephone companies participated only through their trade associations. Exchange Network Facilities for Interstate Access, 71 FCC 2d 440, 447-48 (1979).

[3] At the time, only two carriers – MCI and Southern Pacific Communications Co. (now Sprint) – were offering "MTS/WATS-like" services to the public. Id., at 445.

negotiation today over ISP compensation would involve many ILECs and dozens of competitors. Based on the results to date, there is no reason to believe that commercial negotiations between parties with unequal bargaining power will lead to rates that are any more "efficient" or stable than the rates arrived at through the ENFIA process.

2. Rather Than Put LECs Through Another Negotiation And Arbitration Process, The Commission Should Prescribe A Rate

Putting LECs through another negotiation and arbitration process will only defer – and therefore delay – the task of setting rates. Therefore, the Commission should bite the bullet and prescribe ISP traffic compensation rates at once. By doing so, the Commission will help bring fairness and certainty to this segment of the local service market at the earliest feasible date, and thereby accelerate the ultimate achievement of the Telecom Act goals.

The Commission has authority to prescribe a rate for inter-carrier compensation for interstate ISP traffic. Under Section 201(a) of the Act, where the Commission finds its "necessary or desirable in the public interest," the Commission may issue orders requiring carriers "to establish through rates and charges applicable thereto and divisions[[4]] of such

[4] In the original access charge order, the Commission found that "Congress used the term 'division' in [Section 201(a)] to encompass any arrangement for the compensation of carriers that participate in a through service. That term is at least broad enough to include carrier's carrier charges that compensate an exchange carrier for its participation in a through service that an interexchange carrier offers to the public." MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241, 255 (1983) ("Access Charge Order"). (subsequent history omitted). The same provision authorizes the Commission to establish carrier's carrier charges that compensate an LEC for its participation in an interstate service offered by another LEC.

charges." 47 U.S.C. §201(a). "Division's of charges" may be prescribed where the Commission finds it "necessary and desirable . . . to prevent the development of disparities that might arise if a variety of . . . compensation mechanisms are used in the future." Access Charge Order, 93 FCC 2d at 255. The same rationale justifies the Commission in prescribing inter-carrier compensation for termination of ISP traffic.

In prescribing a rate, the Commission need not prevent the parties from negotiating a different rate. The Commission has recognized that default rates can provide a useful alternative where a negotiated rate is not practical due to unequal bargaining situations. Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 20541, ¶49 (subsequent history omitted). As in the payphone proceeding, the prescribed rate can serve as a default rate to provide an alternative to negotiations that inevitably will be one-sided due to the imperfections of the market, and also as an appropriate starting point for negotiations if the parties wish to pursue them.

III. THE COMMISSION MUST ENSURE CONSISTENCY BETWEEN RATES FOR SIMILAR SERVICES WHERE ILECS ARE NET PAYORS AND NET PAYEES

The Commission's Notice indicates concern that the current per-minute compensation rates do not accurately reflect the "economic characteristics of [ISP-bound] traffic." Notice, ¶29. In this instance, however, what is critically needed is consistency. A requirement of consistency will place the ILECs on clear notice that they must file accurate cost studies because the cost studies will be applied, without discrimination, to ILECs as net payers and as payees. In setting the rate structure and rates for inter-carrier compensation for ISP traffic, the Commission should prevent anticompetitive disparities in compensation rates for termination of traffic by rigorously applying the principle that "a minute is a minute" regardless of whether a carrier is paying or collecting the rate for that minute.

The history of the reciprocal compensation rate provides an important lesson in this respect. As discussed above, the ILECs' possession of bottleneck facilities has given them far greater bargaining power than CLECs and has necessitated that reciprocal compensation rates be set largely through regulatory arbitration and tariff proceedings rather than market-driven negotiations. Yet, even in rate proceedings, the ILECs have a major advantage because they can manipulate and control the disclosure of the cost studies that underlie the rates. The reciprocal compensation process under the Telecommunications Act has starkly illustrated ILEC incentives to manipulate the rate-setting process. At the time the original reciprocal compensation rates were established under the Section 252 process, the ILECs thought they would be net *payees* of compensation. Therefore, the ILECs sought to have the rates set as high as possible. Now that the ILECs have turned out to be net *payors* of compensation instead, they have changed their tune. They now claim that the applicable rate – which is lower than the rate they initially advocated – is too high.

The lesson of this experience is that a perfectly efficient rate structure or rate will prove elusive as long as one party in the process has the incentive and ability to manipulate the data on which regulators must rely. Instead, the Commission's priority should be to require even-handed treatment of all carriers and consistent application of rate methodologies to contexts where different ILEC incentives are at work. The rates that apply in the current context – where ILECs are currently net pay*ors* of compensation – must follow a similar structure and methodology to the rates that apply in contexts where

ILECs are net pay*ees.* This approach will provide ILECs with an incentive to do the Commission's work for it by ensuring that their cost studies accurately reflect economic costs.

A. Rate Symmetry Should Be Maintained Between ILECs And CLECs

The Commission should preserve rate symmetry between the compensation rates applied by ILECs and CLECs. In the First Report and Order, the Commission found that rate symmetry is appropriate because (1) forward-looking costs are likely to be similar for an ILEC and for CLECs operating in the same area; (2) symmetry maintains carriers' incentives to reduce their termination costs; (3) symmetrical rates will prevent an ILEC from using its bargaining strength to insist on high termination charges for itself and low termination charges for competitors; (4) symmetrical rates are easier to derive and manage; and (5) symmetry avoids the need to burden small-business competitors with the cost of conducting economic cost studies. First Report and Order, ¶¶ 1085-88. These reasons are as valid today as they were when the First Report and Order was adopted, and they are equally applicable to termination of ISP traffic as well as termination of local traffic.

B. A Per-Minute Rate Structure Should Apply To ISP Traffic Compensation, Where ILECs Are Net Payers, Just As It Applies In Other Inter-Carrier Contexts Where ILECs Are Net Payees

The Commission should reconsider its tentative conclusion that additional rate structures besides a per-minute rate are needed in order to reflect accurately how costs are incurred. Notice, ¶29. If local termination costs were more efficiently recovered through flat or per-call rates, then one would expect to find this rate structure in other carrier-to-carrier rates used to recover local switching costs -- *i.e.*, terminating access rates at the state and federal levels and the reciprocal call termination rates established to date under the 1996 Act. Yet, the interstate and intrastate access rates that recover these costs are virtually all per-minute rates, and so are the reciprocal call termination rates established in virtually every jurisdiction under the 1996 Act.

Because the termination of all traffic involves the same network functions, a uniform rate structure should apply. If a per-minute cost recovery method is deemed appropriate for switching costs recovered through terminating interstate access charges, it should also be appropriate for recovering the cost of terminating interstate ISP traffic.

Consistency is critical in this area because the ILECs' incentives regarding termination rates for ISP traffic (where ILECs' currently are net *payers*) are radically different from their incentives for terminating access charges (where ILECs are predominantly *payees*). If the Commission is going to experiment with alternative, allegedly more "efficient" cost recovery methods, it should not begin by applying a special rate structure solely to situations where ILECs are in the unique position of being net payors. Such disparate treatment would contravene the fundamental purpose of the Act to eliminate anticompetitive conditions by promoting a "level playing field."

C. RATES SHOULD BE SET BASED ON GENERALLY APPLICABLE STUDIES OF ILECs' TELRIC COST

As discussed above, it is appropriate to preserve consistency among the rates assessed by carriers on other carriers for similar call termination functions. Therefore, where a state commission has approved a compensation rate for termination of voice traffic based on credible TELRIC cost studies, the same rate should be approved by the FCC for termination of ISP traffic.[5] Identical rates for ISP and voice traffic will also greatly simplify the administration of the compensation system by eliminating the need to separate and measure ISP traffic, which is currently infeasible for ILECs and which would be burdensome for all carriers.[6]

1. Initial Rates Should Be Set Based On Existing State-Approved TELRIC Cost Studies

The appropriate starting point for inter-carrier compensation levels for ISP traffic is the rate established in each state based on TELRIC cost studies that have already been approved for this purpose by state commissions. The FCC should set the initial ISP traffic compensation rate at the level indicated by the most recent state-approved TELRIC cost study. If a state has not yet completed its review of TELRIC costs, the Commission should set an interim rate equal to the reciprocal compensation rate approved in the most recent state arbitration.

As an additional safeguard for competition, the FCC should require that the ISP compensation rate for any state must not be lower than a "floor." The "floor" should be

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[5] As noted below, TELRIC costs are likely to be adopted in the future as a methodology for terminating access rates as well. Because all termination of traffic involves the same network functions, it is appropriate to use the same methodology for all traffic termination rates.

[6] The Commission asks whether it is possible to segregate and measure the volume of interstate vs. intrastate ISP traffic. To ICG's knowledge, no carrier has ever even attempted to "meter" interstate vs. intrastate ISP traffic. Indeed, it is not even possible to segregate and accurately measure the volume of ISP vs. voice traffic. Accordingly, there are significant advantages to be gained by having equivalent rates for termination of ISP and voice traffic.

set at the level of the proxy rate established in the Local Competition Order. A "floor" is reasonable for this purpose: The Commission has recognized that there are costs involved in terminating ISP traffic. If the floor is set too high, the result will be to stimulate competitive entry by competitors willing to terminate ISP traffic at a rate closer to actual cost. In addition, a floor will encourage net payors of compensation to offer inexpensive broadband access to their customers to avoid having to continue to pay termination charges for dial-up traffic.

2. Any Updates Of TELRIC Cost Studies Must Be Submitted To The FCC For Approval

To the extent that the ILECs are net payors of compensation for ISP traffic and voice traffic combined, there may arise an incentive for ILECs to "game the system" by manipulating cost studies to reduce the termination compensation rate in both jurisdictions (the voice rate in the state jurisdiction and the ISP rate in the federal)), thereby reducing their net payment to CLECs. To counteract this incentive, the FCC should require ILECs to submit any updated TELRIC cost studies for FCC review. There can be a presumption that the federal rate should be modified when a new state rate above the FCC proxy "floor" is approved. However, if the new state rate falls below the FCC proxy "floor," the cost studies underlying the new must be independently reviewed by the FCC. The FCC should independently investigate state-approved TELRIC cost studies that fall below the proxy floor before approving the updated TELRIC rate for purposes of federal compensation for termination of ISP traffic.

Requiring the state-approved TELRIC cost studies to be filed at the FCC has an added benefit. In the event that the Commission decides to move other federally regulated rates such as terminating access charges closer to actual cost, TELRIC studies can provide a fair measure of cost for this purpose as well.[7] Having the same cost studies used to determine federally regulated rates for services where the ILECs are net pay*ors* as well as for the ISP termination service for which ILECs are net pay*ees* will go even further to ensure even-handed, consistent application of rates to competitively sensitive services.

IV. IN ADDITION TO SETTING CARRIER-TO-CARRIER COMPENSATION RATES FOR ISP TRAFFIC, THE FCC MUST ACT TO ENSURE EQUAL ACCESS TO NEW LOOP TECHNOLOGIES

The Commission should recognize that ensuring fair compensation rates for ISP traffic is only one piece of an increasingly important puzzle – ensuring fair competitive conditions for local data services under the Telecommunications Act. Fair competitive conditions for ISP traffic is becoming more, not less, important as new loop technologies such as Digital Subscriber Line ("DSL") are rolled out. For example, the Commission should investigate whether ILECs are limiting access to this key network element by bundling DSL service with algorithms that automatically route data traffic to the ISPs exclusively using the packet transport networks of the ILEC. In the coming months, the

[7] See Local Competition Order, ¶1033 ("Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge").

Commission must act to ensure equal access to this vitally important data communications technology.

Dated: April 12, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 1999, a copy of the foregoing Comments of ICG Communications, Inc. was delivered by first-class U.S. Mail, postage pre-paid to the following parties:

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